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Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

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SUPREME COURT, U.S.

No. 274

CO-ORDINATED TRANSPORT, INC. of ILLINOIS, a Corporation, et al.,

Plaintiffs-Appellees,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Defendants-Appellants.

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

SAM ALSCHULER,
32 Water St., Aurora, Ill.
FRANK R. REID, JR.,
6 Downer Place, Aurora, Ill.,
Attorneys for Appellants.

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Of Counsel.

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BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

This brief in opposition to the Motion by Appellees to dismiss or affirm this appeal is submitted in conformity with Rule 7 (3) of the Supreme Court of the United States.

As fully shown in the jurisdictional statement in support of Appellants appeal to the Supreme Court of the United States, the jurisdiction of this court is invoked under and

by virtue of subsection 2 of Section 1257 of Title 28 of the Judicial Code of the United States as an appeal from the Final Decree of the Supreme Court of Illinois, wherein the validity of the 1951 Amendment to the Motor Vehicle Law of the State of Illinois is questioned on the grounds of its being repugnant to the Constitution of the United States. The decision by the Supreme Court of Illinois was in favor of the validity of the Statute (..... Ill. ....., 106 N.E. 2d 510), and was entered June 4, 1952.

STATEMENT OF THE CASE.

In this brief opposing the Motion of Appellees to dismiss the appeal, the Appellants point out in affirmation of their jurisdictional statement filed heretofore, that the instant case is not controlled by *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521, and that clearly under subsection 2 of Section 1257 of Title 28 of the Judicial Code of the United States this court should deny the motion to dismiss the appeal inasmuch as the constitutionality of the 1951 Amendment of the Illinois Motor Vehicle Law is involved. The said Statute of the State of Illinois places an unlawful burden on Interstate Commerce and goes far beyond any case decided by this or any other court in both the amount and the theory of the tax, being confiscatory in amount and arbitrary in allocation as well as containing vague, arbitrary, and inconsistent provisions, all in violation of the Constitution of the United States.

ARGUMENT.

I.

This case is not controlled by Bode v. Barrett.

The jurisdictional statement which was filed by these appellants when Mr. Justice Minton signed the order allowing the appeal was directed in large measure to demonstrating that the case at bar is not controlled by the case of *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521. As pointed out in the jurisdictional statement the cases differ in (a) the parties, (b) the economic interests of the parties, (c) the issues, (d) the evidence. The only feature in common between the two suits was that each sought to have the 1951 amendment to the Illinois Motor Vehicle Act declared unconstitutional. While it is true that in both cases charges are made that the Statute in question violates Sec. 8 of Article I and Sec. 1 of Amendment XIV to the Constitution of the United States, the evidence presented and the law argued in the two cases are dissimilar, and, indeed, in many instances, completely divergent, since in the *Bode* case the parties were all intrastate carriers, and since most of the parties in the case at bar are interstate carriers. This very fact produces the divergence of economic interests and necessarily, therefore, produces a different approach to the problems involved. Based on this divergence of interest, different issues have been raised in each case and different evidence was introduced in each case. We contend that one of the greatest errors committed by the Supreme Court of Illinois in its opinion in the case at bar was its statement that the issues in this case were presented to and decided by that Court in the *Bode* case.

The repugnancy of the statute in question to the Constitution of the United States was raised in the complaint filed herein in the Circuit Court of Kane County. The issue of repugnancy to the Constitution of the United States of the Statute of Illinois was squarely put before that court and before the Supreme Court of Illinois. The decision of the Supreme Court of Illinois that this case is controlled by *Bode* v. *Barrett* is necessarily a decision on the federal issues involved since federal issues were presented in the court below and since the Supreme Court of Illinois decided those federal issues. The federal questions were decided, and it is immaterial what the basis for that decision was. The issue at this time is whether or not there is a substantial federal question involved in the case; the basis for the court's decision on the federal question is, at this time, immaterial.

It is not here our purpose to set forth the distinctions between the *Bode* case and the case at bar. This we did at length in the jurisdictional statement which is contained in the record which should be before the Court by the time this brief reaches the Court. As we understand it, the appellees' statement opposing jurisdiction and their motion to dismiss or affirm is in effect a brief attempting to respond to that jurisdictional statement. This brief is then in effect a Reply Brief and reiteration of the detailed discussion of the distinctions between the two cases as contained in the jurisdictional statement would serve only to waste the Court's time. We do rely on the distinctions as pointed out in the jurisdictional statement.

Subsection 2 of Section 1257 of Title 28 of the Judicial Code of the United States provides in part as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

> * * * (2) by appeal where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Clearly, the case at bar involves the validity of the 1951 amendment to the Illinois Motor Vehicle Law. The charge that said statute is repugnant to the Constitution of the United States was made in the original Complaint and was persevered in and argued during each step of the proceedings. The final decision of the highest Court of the State of Illinois was in favor of the validity of the said Statute. Obviously, therefore, this case complies exactly with the terms of the Judicial Code and is exactly the type of case wherein this Court may review the decision of the Supreme Court of Illinois. Moreover, as pointed out in the jurisdictional statement, decisions of this Court, such as *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184, and such as *Schuylkill* v. *Pennsylvania*, 296 U.S. 113, 56 S. Ct. 31, 80 L.Ed. 91, have demonstrated that the Court has found that no particular form of words or phrases is essential to determine whether the validity of a State Statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. It is only necessary that the claim of invalidity be brought to the attention of the State Court with fair precision and in due time. Whether the point was in fact raised in the Court below is itself a Federal question and this Court has placed upon itself the burden of examining the record to resolve that question. We submit that Federal questions were presented to the Court below as the record demonstrates, and that this Court has jurisdiction to decide those Federal questions.

Furthermore, we submit that even if the case at bar were controlled by the case of *Bode* v. *Barrett*, 412 Ill. 204, 106

N.E. 2d 521 this Court should still take jurisdiction of this case since this case complies in all respects with the requirements of the Judicial Code. *Bode* v. *Barrett* is pending at this time before this Court, being Docket 187, October Term, 1952. As a matter of fact, the Complaint in the case at bar was filed before the Complaint in *Bode* v. *Barrett*. However, because the Sangamon County Circuit Court heard the *Bode* case a short time before the Kane County Circuit Court heard the case at bar, the *Bode* case has preceded the case at bar through the Illinois Supreme Court to its filing in the United States Supreme Court. Up to this time no final decision has been made in the *Bode* case on the Federal questions therein involved, nor, indeed, has this Court yet determined that there are Federal questions involved in the *Bode* case. Since the issues and the records in the two cases are dissimilar, perhaps if there are Federal questions involved in both cases, this Court should hear the two cases together, thus providing itself an opportunity to consider all of the evidence and all of the issues in making a final determination of the validity of the Illinois statute. If, on the other hand, this Court should determine that no Federal question has been presented in the *Bode* case then certainly the Court has jurisdiction to hear the case at bar and to determine the Federal questions presented herein.

We call to the Court's attention that appellees have filed in this Court a motion to dismiss the appeal or affirm in the *Bode* case. If the Court should grant the motion in the *Bode* case, and dismiss the appeal, the case at bar remains the sole opportunity this Court has to determine the validity of the 1951 Amendment to the Illinois Motor Vehicle Act. Appellees are attempting to play one case against the other in an effort to deprive those affected of their right to a determination by this Court of the Constitutional questions presented.

We, therefore, submit (a) that the case at bar is not controlled by *Bode* v. *Barrett* and must be reviewed because the case at bar involves the validity of a state statute on the ground that it is repugnant to the Constitution of the United States, and the decision below was in favor of its validity, or in the alternative, we submit (b) that even if *Bode* v. *Barrett* is in any sense controlling, the *Bode* case has not yet been decided by this Court on the Federal issues, if any exist in the *Bode* case, and this Court should, to make a complete determination, hear both cases together, and in any event, determine the Federal issues presented in this case.

II.

A.

The tax in the 1951 Amendment to the Illinois Motor Vehicle Law produces an unlawful burden on Interstate Commerce.

The parties plaintiff in this case are clearly entitled to challenge the Illinois Statute upon the ground that it imposes an unlawful burden upon interstate commerce. Their connection with interstate commerce is clearly evident from the record.

For example, Co-Ordinated Transport transports freight in interstate commerce (Abst. 37) in Wisconsin, Illinois, Indiana, and Ohio (Abst. 38); Wagner Transfer does seventy-five per cent (75%) of its work between States (Abst. 53); Alton Box Board operated one million miles outside of Illinois in 1951 (Abst. 61); Plaintiff Young's leased trucks in that same year operated only 200,000 miles within Illinois and 2,300,000 miles outside the State (Abst. 66). Even carriers such as Plaintiff Cain and Plaintiff Ryan are integral parts of interstate commerce; Cain travelled but 2000 of a

total of 55,000 miles outside of Illinois (Abst. 70), but leased his equipment to an interstate carrier with offices outside Illinois (Abst. 69). Ryan is a connecting carrier connecting with interstate operators and shared in a rate set by the Interstate Commerce Commission, although Ryan's entire mileage was in Illinois (Abst. 76).

Those few plaintiffs which appellee states have no concern with interstate commerce are actually engaged in interstate commerce. Plaintiff Haen operates on an interstate exchange of trailers (Abst. 71); Gold Star Motor Service (Church) is a connecting carrier in interstate commerce (Abst. 86), and plaintiff Valentine not only is a terminating carrier in interstate commerce, but does cross country hauling in all 48 states through a lease arrangement with Allied Van Lines (Abst. 96).

These facts in evidence in support of the averments in the complaint that plaintiffs were engaged in interstate commerce clearly bring plaintiffs within that class of persons as to whom the act is unconstitutional as a violation of Art. 1, Sec. 8 of the Constitution of the United States. Because plaintiffs are engaged in interstate commerce they are injured by the burden imposed by the Statute, and thus *Southern Ry. Co.* v. *King*, 217 U.S. 524, 54 L. Ed. 868; *M. K. & T. Ry.* v. *Cade*, 233 U.S. 642, 648, 34 S. Ct. 678, 58 L. Ed. 1135, *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078. *Hendrick* v. *Maryland*, 235 U.S. 610, 621, 35 S. Ct. 536, 59 L. Ed. 385 and *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 595-6, 59 S. Ct. 744, 83 L. Ed. 1001, cited by appellees (Statement Opposing Jurisdiction, p. 5) demonstrate that this Court should take jurisdiction of this case.

Appellees' position is that plaintiffs, despite this obvious participation in interstate commerce, have no right

to complain of the burden on interstate commerce because all the plaintiffs are either residents of Illinois, Illinois corporations or foreign corporations licensed to do business in Illinois with places of business in this state and thus are taxed on a parity with other Illinois operators. This contention hardly merits answer in view of the facts of the case and the numerous decisions of this Court holding that it is the *interstate commerce* which is protected. The place of residence or business of the person conducting such commerce is not controlling;

See: *Puget Sound Stevedoring Co.* v. *Tax Commission of State of Washington*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68, 72.

In *Freeman* v. *Hewit*, 329 U.S.249, 67 S. Ct. 274, 91 L. Ed. 265. *reh. den.* 329 U.S. 832, 67 S. Ct. 497, 91 L. Ed. 705, this Court was faced with a case involving the constitutionality of the Indiana Gross Income Tax on an interstate transaction. The taxpayer was domiciled in Indiana, and the securities had their situs in Indiana. The sale upon which the Indiana tax was imposed was in interstate commerce. In holding that the tax was unconstitutional and in disposing of the suggestion that because Indiana transactions were likewise taxed at the same rate as interstate transactions, the tax was in all respects proper, the Court stated at p. 273:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. *It*

cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. *But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce.* The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things." (Italics supplied)

Appellees' contention that a citizen engaged in interstate commerce may question the burdens imposed on interstate commerce of all states but that of his residence, is as absurd as it is novel. The tax in question is imposed only on Illinois highway users. The tax burdens users of Illinois highways alone. By attempting to preclude all Illinois residents and those having places of business therein engaged in interstate commerce from challenging the validity of the Act, appellees would summarily deny relief to those very persons most in need of it.

B.

Previously decided case have not considered a tax similar in extent or principal to the one involved in the case at bar.

In Section II B of the Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm, the appellees

candidly state that it is their belief that on the merits the appellants' contentions have been denied by this Court in other decisions. It is our belief that appellees are misusing the purpose of a statement opposing jurisdiction to discuss the merits of the case. It is not our purpose here to go into the merits in detail, since we will reserve consideration of the merits until the proper time in this proceeding. However, we cannot leave unanswered the prejudicial statements made by appellees, and we shall, therefore, briefly consider those statements.

Appellees state that this Court has heretofore denied appellants' contentions in "decisions so precisely applicable alike in facts and in principle as to apply a closure to debate." We specifically deny that previous decisions of this Court are like this case either in fact or in principle.

The vast number of cases, some few of which have been cited by appellees, involving licenses or taxes on motor carriers before this Court, indicates that it is the Court's policy to hear these cases upon their individual merits and not to apply the "closure of debate" which appellees suggest, merely because of a similarity in the nature of the tax. As Mr. Justice Frankfurter stated in *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053, at page 1063:

> "Examination of decided cases reveals that the largest flat tax heretofore sustained was $15.00 for six months or $30.00 per year, and the largest annual tax based upon size or weight was $75.00."

And the largest tax of any nature ever sustained by this Court was $750.00, as appears from appendix A to the Brice opinion (94 L. Ed. 1065, 1066). The maximum tax involved in this case is $1588.00 per year. Do appellees contend that a tax of $1588.00 is in any way comparable

in its burden on interstate commerce to a similarly designed tax of $75.00? As Mr. Justice Frankfurter stated in the *Capital Greyhound* case *supra* at page 1063:

> "The problem is inescapably one of determining *how much is too much* in the total nature of the tax. Thus it becomes important to see how Maryland tax compares in amount with similar taxes in prior cases. This is done not to test the tax as individually applied to appellants, but to determine whether general application of a tax of this magnitude may fairly be deemed to burden interstate commerce unduly." (Italics supplied)

We submit that based on the amount of tax involved alone the facts in the case at bar are completely dissimilar from any case heretofore considered by this Court.

So, too, in principle is the record in this case unlike those cases heretofore decided by the Court.

The record in the case at bar contains the testimony of Professor Worley as pointed out by the appellees and as discussed at considerable length in the jurisdictional statement filed by the appellants. Professor Worley is a transportation expert and in his expert opinion, substantiated by many facts and figures, he demonstrated that the basic structure of the tax itself was discriminatory and arbitrary. This tax, the evidence showed, was so fundamentally unsound that it is excessive in the higher weight brackets by as much as 300% over the reasonable value of the privilege of using the highways. The statute is based on a ton mile theory, but the evidence discloses that the ton mile theory has never heretofore been used in the unorthodox manner in which it was used here. In every case of this type decided by this Court, commencing with the case of *Hendrick* v. *Maryland*, 235 U.S. 610, 35 S. Ct. 536, 59 L. Ed. 385, this Court has indicated that taxes of this

nature must be reasonable. At page 623 of the opinion in the *Hendrick* case, the Court said:

> "The amount of the charges and the method of collection are primarily for determination by the State itself; and *so long as they are reasonable and are fixed according to some uniform, fair, and practical standard*, they constitute no burden on interstate commerce." (Italics supplied)

See also *Interstate Transit* v. *Lindsey*, 283 U.S. 183, 51 S. Ct. 380, 75 L. Ed. 953, *Dixie Ohio Express Company* v. *State Rev. Comm.*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495, *Aero Mayflower Transit Company* v. *Railroad Commissioners*, 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99, and *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 at page 1063.

We submit that the rule as laid down in *Hendrick* v. *Maryland*, *supra* has never been overruled by this Court, and we specifically contend and desire the opportunity to show the Court that in the case at bar the taxes established by the Illinois Legislature are in fact unreasonable and are not fixed according to any uniform, fair or practical standard, and that, therefore, they are a burden on interstate commerce. The purpose of this brief is solely to demonstrate that the Court should take jurisdiction of the case to decide the validity of a tax that "on its face appear(s) monstrous in amount". See *Capital Greyhound Lines* v. *Brice*, *supra*, page 1064.

The various cases cited by appellees lay down the rule that the legislature has discretion in establishing taxes of this nature and is not bound to scientific precision, and that as a practical matter, we must be content with rough approximation in considering the validity of taxes. We do not quarrel with this rule; however, we do submit that when expert testimony in the record before this Court demonstrates that in some classifications the tax imposed

by the Illinois legislature exceeds by as much as 300% the reasonable value of the privilege of using the highways, the Illinois legislature has gone beyond the limits of even rough approximation and has entered the realm of unreasonable and arbitrary taxation and has imposed a burden on interstate commerce.

III.

The 1951 Amendment to the Motor Vehicle Act of Illinois is confiscatory in violation of the XIV Amendment to the Constitution of the United States.

Although Rule 12, paragraph 3 of the Supreme Court of the United States allows the appellee to file a statement against the jurisdiction of this Court, and the said statement should, therefore, have been directed against the jurisdictional statement filed by the appellants, the appellees have seen fit to attempt, in their statement, to argue the merits of the errors assigned at Nos. 5 and 6 of Appellants' Assignment of Errors. We question that this is the time to argue the merits of the Federal questions involved in this case, but we cannot leave appellees' statement unchallenged. The evidence as to confiscation is clear. Appellees in their statement admit that the witnesses testified that the taxes imposed by the 1951 Act would exceed estimated future net profits calculated upon the basis of the then current transportation rates. In addition, the record discloses (Abst. 44, 84) that increases in rates will not be forthcoming because in interstate commerce the rates are controlled by the Interstate Commerce Commission on a competitive basis. Since competition on long hauls is with carriers from other states who are not affected by the Illinois Act, no general rate increase by the Commission would be likely, and on a short haul basis in interstate commerce, carriers simply share in the long

haul rate which pertains to the long haul carrier, who need not be and usually is not affected by the Illinois license fee.

Appellees in their statement emphasize that not one witness testified that the increased rates imposed by the 1951 Act would force his concern to go out of business. Actually, of course, we were not allowed to ask of the witnesses whether in their opinion they would be forced out of business, since Appellee objected to said question on the basis of its requiring a speculative answer. By the same token, it is an inescapable conclusion that if a license fee is charged which exceeds net profits, and if rates cannot be increased to increase those profits, the operations of the affected truckers necessarily would result in a loss. And it is further perfectly reasonable that where operations are conducted at a loss the only alternative is for the concern to go out of business. The record, therefore, which is uncontradicted by the appellees, clearly discloses that the tax imposed by the 1951 Act confiscates the businesses of the plaintiffs in this case. Since these plaintiffs are a representative cross-section of the entire trucking business in Illinois, both intrastate and interstate, the entire industry, or a large segment thereof, is confiscated by the operation of the Act contrary to the guaranties of the XIV amendment.

We suggest that the above consideration of the confiscation issue demonstrates conclusively that there is here presented a Federal question for consideration by the Court on its merits. However, the appellees continue in their statement by citing the case of *Magnano Company* v. *Hamilton*, 292 U.S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, which we submit should have no place at this time in a consid-

eration of jurisdiction. In the portion of the *Magnano* case quoted by the appellees it is stated:

> "That clause (the XIV Amendment) is applicable to a taxing statute such as the one here assailed only if the Act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

We have alleged, and here contend, that the 1951 amendment to the Motor Vehicle Act of the State of Illinois is in fact the exertion of such a power in that it confiscates a useful and legitimate business which the legislature of Illinois would have no power to prohibit in the interests of public health, safety and welfare under the police power. Although at the proper time we will brief this point at considerable length, suffice it now to point out to the Court that this Court and other Courts have held on numerous occasions that a legislature may not indirectly prohibit a legitimate business by taxation where such business may not be directly prohibited. For example, in the case of *Nichols* v. *Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, where a portion of the Federal Estate Tax Law was held unconstitutional as violating the Fifth Amendment to the Constitution (since a Federal Statute and not a State Statute was involved), the Court said at page 542:

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."

And again dealing with a Federal Statute and the Fifth Amendment, which is exactly comparable to a State Statute and the Fourteenth Amendment, this Court said in the case of *Tyler* v. *The United States*, 281 U.S. 497, 50 S. Ct. 356, 74 L. Ed. 991, at page 998:

> "The point made is that the tax is so arbitrary and capricious as to amount to confiscation, and, there-

fore, to result in a deprivation of property without due process of law * * * the possibility that a Federal Statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the Due Process Clause of the Fifth Amendment must be conceded."

Our contentions are clearly set forth in the case of *Fiscal Court of Owen County et al* v. *F. & A. Cox Company*, 132 Ky. 738, 117 S.W. 296, involving a graduated license tax on horse drawn vehicles, which was held invalid. The Kentucky Court says at page 298:

"It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for its discretion. (citing cases). This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (citing cases). While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000, or imposing upon every merchant a license of $5,000, or upon every washerwoman a tax of $1,000 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means

of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid. (citing cases.)"

We suggest that the above cases completely answer appellees' contentions. Indeed, the *Magnano* case itself shows that this Court has jurisdiction to determine whether the tax here in question in substance and effect amounts to an exertion of forbidden power to confiscate property. Moreover, since the *Magnano* case involved a tax on a butter substitute, which tax in effect might well aid in protecting the public from unscrupulous dealers foisting the substitute on the consumer as genuine butter, it could well be said that the Court was there dealing with a situation where the legislature could legitimately prohibit a business in the interests of the public welfare, whereas no one has ever contended that the trucking business in any manner should be prohibited or could be under the police power. It involves no fraud; the trucking industry in fact is essential to provide the transportation necessary to maintain the present day economy. Its continued operation is imperative for the protection of the public health, safety and wel-

fare. It may not be prohibited directly under the police power, and therefore, under the *Magnano* case and under all the other cases cited it may not be confiscated indirectly by means of a tax.

We submit on the basis of the above that this Court has the right and the duty to accept jurisdiction and to determine whether in fact and in law the 1951 amendment to the Motor Vehicle Act of Illinois is confiscatory, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

IV.

The 1951 Amendment to the Illinois Motor Vehicle Act violates the Fourteenth Amendment to the Constitution of the United States by reason of vague, arbitrary and inconsistent provisions.

Appellees first point out that the indefinite agricultural exclusion has existed in the Motor Vehicle Law of Illinois in substantially its present form for over twenty years. We submit that simply because an unconstitutional provision has remained unchallenged for twenty years it is not made constitutional thereby. Furthermore, the long list of cases cited by appellees in their statement and motion relative to agricultural exemptions indicates beyond any doubt that the inclusion in the Statute of an agricultural exemption gives rise to a justiciable question, since, otherwise, all the cases cited by the appellees with reference to such exemptions could not have arisen. Obviously, none of the cases cited are controlling in the case at bar, since none of them is concerned with the particular agricultural exemption contained in the questioned Act, nor with an identical provision. Those affected by the Illinois Act are as entitled to have their day in Court on the question as those residents of other states who were parties in the cases cited. The mere

existence of the number of cases cited by appellees demonstrates, we submit, beyond doubt that the agricultural exemption contained in the Illinois Act is one to which these parties are entitled to a final judicial determination.

We also maintain that the lower tax rates provided for buses operating in a municipality or municipalities or within a "close radius thereof" is indefinite and constitutes a discrimination in favor of buses and against trucks which similarly operate. The words "close radius thereof" could mean many things to different people and are undefined in the statute. So, too, the entire tax is based on the weight of the vehicle with a "maximum load." This term is also undefined and could mean many things and could be defined only by an administrative officer exercising a legislative function. As demonstrated above, the case of *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521, should not be deemed as conclusive, since it is now pending on appeal before this Court.

Therefore, we submit that because of the vague, indefinite and uncertain provisions, some of which we have herein mentioned, a question arises under the Fourteenth Amendment to the Constitution of the United States upon which this Court should pass.

CONCLUSION.

We again respectfully point out to the Court that the only question at issue at this time is the jurisdiction of this Court to hear and determine the Federal questions raised in this case now before the Court. We have not here attempted to discuss the merits any more than we were obliged to do so by the nature of the statement and motion made by the appellees. We do, however, submit that the case at bar is not controlled by the case of *Bode* v. *Barrett*, and that even if it were controlled by *Bode* v. *Barrett*, in view of the different issues involved in the two cases, and

since *Bode* v. *Barrett* is on appeal to this Court and as yet undecided, these appellants should have the opportunity of presenting their case to this Court along with the parties in the *Bode* case.

Moreover, the foregoing brief answers the points in appellees' motion. Other substantial questions involved are set forth in our jurisdictional statement. It would be difficult and inappropriate at this stage, without a printed record or even an unprinted record consecutively paged to which reference can be made, to elaborate our contentions. Further argument and analysis of the record properly await the hearing on the merits. The case is within the appellate jurisdiction of this Court. It presents substantial federal questions. Appellees' motion should be denied.

Respectfully submitted,

SAM ALSCHULER,
FRANK R. REID JR.,
Attorneys for Appellants.

SAM ALSCHULER,
FRANK R. REID JR.,
RALPH C. PUTNAM JR.,
WILLIAM C. MURPHY,
ROBERT B. HUPP,
Of Counsel.